

**(2014) 04 BOM CK 0068**

**In the Bombay High Court**

**Case No :** Anticipatory Bail Application No. 4 of 2014

Tarmindar Singh Mehtab

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

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**Date of Decision :** 17-04-2014

**Acts Referred:**

Constitution of India, 1950 — Article 227

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 397, 397(3), 399, 399(3)

Penal Code, 1860 (IPC) — Section 120B, 341, 344, 347, 407

**Citation :** (2014) 04 BOM CK 0068

**Hon'ble Judges :** Mridula Bhatkar, J

**Bench :** Single Bench

**Advocate :** Mahesh Vaswani, i/b Dharini Nagda and Jagdish Shetty, Advocate for the Appellant; S.K. Shinde, P.P., A.A. Mane, APP, Bhavesh Parmar, i/b D.G. Shukla and Vijay Prakash yadav, Advocate for the Respondent

**Final Decision :** Disposed Off

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## **Judgement**

Mridula Bhatkar, J.

P.C.:

1. The application is moved for anticipatory bail u/s 438 of the Criminal Procedure Code. A complaint is registered against the applicants/accused at the instance of Preeti Sharma, who is the real sister of the applicant/accused No. 1. It is the case of the complainant that her father Jaswant Singh Mehtab, approximately 80 years old, is residing alongwith the applicant/accused No. 1. The applicant/accused No. 2 is the wife of the applicant/accused No. 1. The applicants/accused Nos. 3 and 4 are the sisters of applicant No. 2 and applicant/accused No. 5 is the mother of these sisters. It is the case of the complainant that her father is a patient and he is suffering from various diseases and especially he is a victim of Dementia and, therefore, does not remember anything and he is not mentally oriented due to dementia. He developed dementia nearly 2 years back and the Psychiatrists have certified in April, 2012

that he is suffering from Dementia. All the applicants are residing in the property of her father and have complete control over her father. All the applicants/accused by taking disadvantage of the age and the mental ailment of her father, had started grabbing the property of her father. The applicants/accused are not taking proper care of her father and they all prepared forged documents and also obtained documents fraudulently, signed and executed from her father, namely, Power of Attorney in favour of applicant No. 2. Also, bogus wills were got executed by the father in favour of the applicants/accused. A gift deed was also executed by the father in favour of the applicants/accused. Thus, it is the case of the complainant that all the applicants/accused, in connivance with each other, have tried to misappropriate the property of her father, valued at Rs. 10 crores and, therefore, she gave complaint. She presented the complaint before the learned Magistrate, 37th Court, Mumbai and the learned Magistrate gave directions u/s. 156(3) of the Criminal Procedure Code to the Senior Inspector, Azad Maidan Police Station to investigate the matter. Pursuant to the said directions, the police initiated investigation and they registered crime at MECR No. 2 of 2013 for the offences punishable under sections 341, 344, 347, 407, 408, 465, 467, 468, 471, 474 r/w 120B of the Indian Penal Code.

2. The learned Counsel for the applicants/accused has submitted that the applicant/accused No. 1 is a businessman and he is assisting his father Mr. Jaswant Singh Mehtab in the business of printing, which is run in the name and style as "Letter print". The applicant/accused No. 2 is the legally wedded wife of applicant No. 1. All the applicants are taking care of the father of the complainant. The applicant/accused Nos. 2 & 4 are also working as employees in the said business. The applicants/accused have not committed any offence. The applicants/accused are taking proper care of Jaswant Singh Mehtab. Due to his physical condition, Mr. Jaswant Singh Mehtab wanted to execute Power of Attorney and decided to appoint applicant No. 2 as the Constituted Attorney for his banking transactions. It was further submitted that all the documents i.e., the wills, gift deeds, which are alleged to be forged or doctored, have in fact been prepared by the father by his own will and duly executed by him. So it is submitted that Jaswant Singh Mehtab has executed the documents to make arrangement of his assets and as he trusted the applicants/accused Nos. 1 & 2, the documents were executed in favour of applicants/accused Nos. 1 and 2. It is further submitted that at the time of execution of the documents, Mr. Jaswant Singh Mehtab was mentally fully oriented and a fit person and, therefore, the applicants/accused cannot be blamed for manufacturing these documents. The learned Counsel has further submitted that the complainant is aware since last 5 to 6 years that the applicants/accused are dealing with all the bank and business transactions of her father. However, when there was a public pronouncement of the will of the father, at that time, the complainant had knowledge that her father is not leaving any property to the complainant. Thereafter, being aggrieved by the said act of her father, she, out of vengeance, has lodged this criminal case against the applicants/accused. The learned Counsel has submitted

that the applicants/accused are innocent and have not committed any offence. It is further submitted that all the documents are in the custody of the police and there is no need for custodial interrogation of the applicants/accused. Hence, he seeks anticipatory bail for the applicants/accused.

3. Mr. Shinde, learned Public Prosecutor, and the learned Counsel for the Complainant have opposed this application for anticipatory bail. It was submitted that the Mr. Jaswant Singh Mehtab is suffering from dementia since 2012 and many specialists have certified that due to dementia, there is a memory loss to a great extent. It is argued that Mr. Jaswant Singh Mehtab had paralytic stroke in 2008 and thereafter his health deteriorated. It is argued that Mr. Jaswant Singh Mehtab is unable to recognise his relatives. The applicants/accused took the opportunity to grab the property by manufacturing the forged documents especially Power of Attorney dated 11.11.2011 since 2008, three banking Power of Attorneys executed in favour of the applicant/accused No. 2 in January 2008. It was argued that the father of the complainant has allegedly prepared two wills—one dated 10.11.2011 and the other on 14.1.2012. It was further submitted that those wills are bogus and they are prepared by the applicants/accused. It was submitted that when Mr. Mehtab was suffering from dementia and his health had started deteriorating from 2008 and dementia from 2012, he was not at all in a mental and physical state to prepare the said wills. The thumb impressions and signatures appearing on the will are forged. The learned Counsel relied on the report of Dr. S.V. Khadilkar dated 5.1.2013 disclosing that he is suffering from irreversible dementia. His memory is impaired. It was further submitted that the gift deed dated 1.10.2012 was also prepared by the applicants/accused in which the entire property was gifted to the applicants/accused. However, now the said gift deed is missing. It was argued that the said gift deed is to be recovered from the applicants/accused. Learned Counsel for the Complainant and the learned APP therefore submitted that the custody of the applicants/accused is required. In support of his submissions, the learned Prosecutor relied on the case of Gurubaksh Singh Sibbia vs. State of Punjab AIR 1980 SC 1632

4. The learned Counsel for the Complainant challenged the maintainability of the application, which is filed u/s 438 of the Criminal Procedure Code. The objection was raised mainly on the ground that once an application is filed before the Sessions Court u/s 438 of the Criminal Procedure Code, a similar application for anticipatory bail cannot be filed or entertained by the High Court u/s 438 of the Criminal Procedure Code. The learned Counsel has submitted that the remedy open to the applicants/accused is not u/s 438 of the Criminal Procedure Code in the High Court but either by way of filing a Writ Petition under Article 227 of the Constitution of India or u/s 482 of the Criminal Procedure Code. He submitted that the Section gives choice to the accused to apply either before the Sessions Court or before the High Court. However, once the application is made and either of the fora is exploited, then, a second application under the same conditions cannot be made u/s 438 of the Code. The practice of filing a second application in the High Court if the application for anticipatory bail is rejected by the

Sessions Court is deviation from the legality and the procedure and not the real object of section 438 of the Code. The learned Counsel has submitted that both the Courts are having concurrent jurisdiction u/s 438 of the Code. Therefore, the dual opportunity u/s 438 of the Criminal Procedure Code will defeat the very aim and object with which the Legislature has incorporated the said section. The learned Counsel has advanced his submissions on the basis of the recommendations made in the 203rd report of the Law Commission submitted in 2007. It was argued that once the option is exercised, then, the person will have no further option to move the other Court having concurrent jurisdiction. If the person chooses to come to the High Court straightaway, in the first instance, then, he shall be deprived of a remedy of revision or Writ Petition available to him in the High Court. The Law Commission in its report has recommended that section 438 should be amended and a provision on the lines of the section 397(3) to be added. The learned Counsel in support of this submissions relied on a catena of judgments to submit that once the concurrent jurisdiction is used, it is exhausted. The learned Counsel further submitted that if one forum having a concurrent jurisdiction decides the issue, then, the other Court having a concurrent jurisdiction cannot decide as it will amount to *res judicata*. The learned Counsel for the complainant further submitted that the applicants/accused have moved the Anticipatory Bail Application after registration of the crime before the Sessions Court, Mumbai, who granted protection to the applicants/accused. The learned Counsel submitted that surprisingly after getting interim protection and during the pendency of the case, the applicants/accused got the affidavit executed in the name of Mr. Mehtab on 14.6.2013 denouncing the complainant as his daughter and confirming that he has executed all documents. The learned Counsel for the Complainant has submitted that in 2013, as per the medical record, Mr. Mehtab was a victim of dementia and it is impossible to believe that he could make such affidavit in such coherent and consistent manner.

5. Mr. Shinde, learned Prosecutor and the learned Counsel for the accused while opposing the submissions on the point of maintainability, argued that it is a settled practice in the Bombay High Court to move an application before the Sessions Court and if it is rejected, then seek remedy before the High Court. This does not amount to either deviation or is contrary to the concept of concurrent jurisdiction. In support of their submissions, they relied on the judgments in *Gopinath Vs. State of Kerala*, *Jagannath vs. State of Maharashtra* 1981 Cri.L.J. 1808; *Usman vs. Sub Inspector of Police* and another 2003 Cr.L.J. 3928; and a Division Bench judgment in the case of *I.Y. Canda Erappa vs. State of Karnataka* 1989 Cr.L.J. 2405.

6. A legal issue raised by the learned Counsel for the Complainant/Intervener is as follows:

Once the remedy of pre-arrest bail is availed of before the Sessions Court, then the recourse is not available to a party before the High Court under the same

section 438 of the Criminal Procedure Code.

7. The powers u/s 438 of Criminal Procedure Code are concurrent and it is upto the petitioner to choose either of the two. This view is taken by the Full Bench of the Allahabad High Court in the case of Onkar Nath Agrawal and Others Vs. State, The Full Bench of the Himachal Pradesh High Court in Mohan Lal and Others etc. Vs. Prem Chand and Others etc., held that a person can apply for pre-arrest bail to the High Court directly without invoking the jurisdiction of the Sessions Court. Similar is the view taken by a learned Single Judge of the Bombay High Court in the case of Mohanlal Choudhari Vs. State of Maharashtra, . He may file application either before the Sessions Court or before the High Court. However, the High Court follows a self imposed rule of restriction not to ordinarily entertain the applications u/s 438 of the Criminal Procedure Code unless the application is placed before the Sessions Court which is below in hierarchy. If the first application is moved before the High Court then the observations made by the High Court are likely to cause prejudice if a second application is moved before the Sessions Court. However, by way of exception, the application for pre-arrest bail can be entertained directly by the High Court. As a regular practice, the application is generally moved before the Sessions Court and if the application is rejected by the Sessions Court alongwith the order of the Sessions Court, the second application for pre-arrest bail is moved before the High Court u/s 438 of the Criminal Procedure Code. The learned Counsel for the Intervener/ Complainant has contended that to grant anticipatory bail is a discretionary power and once this discretion is used by one forum, then, it cannot be used again by the other Court which may amount to forum shopping and that is to be barred.

8. The submissions of the learned Counsel are entirely based on the recommendations made by the Law Commission in its 203rd report of 2005. In the note 6.4 of the said report, the Commission has given a detailed note on concurrent jurisdiction enjoyed by the High Court and the Sessions Court u/s 438. It is mentioned that there is a conflict of opinion amongst various High Courts that if High Court is entertaining the application challenging the order of Sessions Court u/s 438, then, it is essentially a revisional power over the order of Court of first instance and by invoking concurrent jurisdiction, such power is not available to the High Court u/s 438 of the Criminal Procedure Code. Under the said note, the Law Commission has referred to a number of rulings of High Court and the Supreme Court. A three-Judges Bench of the Calcutta High Court in Diptendu Nayak & Ors. vs. The State of West Bengal 1989(1) Crimes 435 (Calcutta), has held that the bail application u/s 438 of the Criminal Procedure Code might be moved to the High Court after the applicant had not succeeded before the Court of Sessions. A similar view is taken by the Delhi High Court in the case of Arun Madan Vs. State, wherein it was held that the person, who loses before the Sessions Court, can again move the High Court for the same purpose under the same section.

9. In Rameshchandra Kashiram Vora and etc. Vs. State of Gujarat and Another, the learned Single Judge of the Gujarat High Court had observed that ordinarily the Sessions Court is nearer to the accused and easily accessible so the application can be preferred before the Sessions Court. However, further remedy to approach the High Court is not barred and he may prefer a substantive application u/s 438 or revision u/s 397 of the Criminal Procedure Code. The Law Commission in the said clause has observed that the section has generated much litigation that could have been avoided and, therefore, it observed in clause 6.4.21(ii) thus-

Once that option is exercised and that person decides to move one of these Courts, then the person will not have any further option to move the other Court

In clause 6.4.21. (iii), it observed-

Where the person chooses to move the Court of Session in the first instance, a revision will lie in the High Court against the order of Court of Session on the application for issue of directions u/s 438

In Chapter 7, the Law Commission has incorporated the recommendations on section 438 in which clause 5 is suggested as follows:

5. If an application under this section has been made by any person either to the High Court or the Court of Session, no further application by the same person shall be entertained by the other of them.

10. Thus, the Law Commission has strongly recommended that approaching two fora u/s 438 having concurrent jurisdiction one after the other is against judicial discipline and the applicant's recourse to the other forum should be foreclosed if his application is rejected by the forum he has earlier chosen. The Law Commission has referred to and relied on subsection (3) of section 397 of Criminal Procedure Code. Section 397 provides a power of revision to the High Court or the Sessions Court. The power u/s 397 is also concurrent. However, subsection (3) of section 397 places bar on the second revision which reads as follows:

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them.

11. In a nutshell, the Law Commission has strongly recommended the same subsection (3) of section 397 to be added u/s 438 of the Criminal Procedure Code, resulting into non-availability of a second bail application before the other forum having concurrent jurisdiction under the same section.

12. Before dealing with this issue and expressing my view, at the outset, I must note that the recommendations of the Law Commission is not a law as they are not yet accepted and accordingly the Legislature has not yet enacted the Code. A contrary view is taken by various High Courts and the Supreme Court. Sections

438 and 439 both confer concurrent jurisdiction to the sessions and High Courts. Therefore, the law laid down in respect of section 439 has bearing over the issue of concurrent jurisdiction enjoyed by both the Courts u/s 438 of the Code.

13. In the case of *Dainy @ Raju vs. State of Madhya Pradesh* 1989 J.L.J. 232, Justice R.C. Lahoti (the then Judge of the Madhya Pradesh High Court and later on Chief Justice of India) has referred to sections 438 and 439 of the Criminal Procedure Code as in both the sections, the power given to the High Court and Sessions Court are concurrent. u/s 438, the power to grant application for pre-arrest bail and u/s 439, the power to cancel the bail are given. It was observed by His Lordship in the latter part of para 19 thereof as follows:

19. The jurisdiction of High Court and Court of Session u/s 439, Cr.P.C. being concurrent, as a matter of practice, the bail applicants are required ordinarily to approach the Court of Sessions in the first instance and if relief is denied they approach the High Court u/s 439, Cr.P.C. itself, not as a superior Court sitting in appellate or revisional jurisdiction over the order of the Court of sessions, but because the superior Court can still exercise its own jurisdiction independently, unaffected by the result of exercise by the Court of Session because the latter is an inferior Court though vested with concurrent jurisdiction. The application seeking bail before the High Court is accompanied by an order of the Court of Session rejecting a similar prayer. The idea is to provide the superior Court with an advantage of apprising itself with the grounds as considerations which prevailed with the Court of Session in taking the view which it did. ....

14. A learned Single Judge of the Bombay High Court in *Devidas Raghu Naik Vs. The State*, has held that when the Sessions Court has refused the bail u/s 439, does not operate as a bar for the High Court entertaining a similar application u/s 439 on the same facts and for the same offence.

15. A learned Single Judge of Kerala High Court in the case of *Gopinath Vs. State of Kerala*, has compared the provision u/s 397(3) and 399(3) wherein a specific bar to prefer a second revision is found unlike section 438 of Criminal Procedure Code. It was held that no such provision is made regarding exercise of rights u/s 438 and, therefore, there is no reason to read such bar into section 438, which is neither expressly nor impliedly provided. In the case of *Jagannath vs. State of Maharashtra* 1981 Cri.L.J. 1808, a learned Single Judge of the Bombay High Court has taken a similar view as in *Gopinath vs. State of Kerala* (supra) and it also relied on section 397(3) of the Criminal Procedure Code, which is absent in section 438 and, therefore, this indicates that what was intended was exercise of concurrent jurisdiction by the Court of Sessions and the High Court in the matter of grant of bail.

16. Section 397(3) confers the power of revision to the Sessions Court and High Court. Section 399 is about the revisional powers to the Sessions Court where it is mentioned that the powers which are exercised by the High Court under subsection (1) of section 401 may be exercised by the Sessions Court. Section

399(3) puts bar on the High Court to entertain further proceedings by way of revision, if a revision is already on the same point by the same person preferred before the Sessions Court. Thus, sections 397(3) and 399(3) specifically mention that second revision is not maintainable. Section 438 and section 439 confer concurrent jurisdiction in respect of granting pre-arrest bail and cancellation of bail to the Sessions Court and the High Court respectively. However, the bail which is granted by the High Court cannot be canceled ordinarily u/s 439(2) by the Sessions Court.

17. Thus, the Legislature did not put any restriction on the number of presenting the applications for pre-arrest bail or moving application for cancellation of bail before the Sessions Court or High Court. There is no restriction that once the pre-arrest bail application is made before the High Court or Sessions Court, then the remedy is fully exhausted and not available. Obviously, with an object to protect the freedom and liberty of an individual the number of applications are not restricted under the said provision. The section is entirely founded on the supreme value of the protection of the liberty of an individual and to avoid unwarranted arrest and humiliation of a person and, therefore, on that basis of change of circumstance as many as applications can be moved before the same Judge. However, the petitioner is required to make out his case of change of circumstances. Secondly, when the power is discretionary, then, it necessarily depends on understanding of law, facts, experience, worldly wisdom, robust common sense, fairness and individual's notions of justice. The law does not prevent that once the discretion is used by a particular Judge, then, the discretionary power cannot be used again by the other forum. Thus, by way of practice if the Sessions Court has decided the application, then, the other forum who is having a concurrent jurisdiction is made available to the said petitioner. It is bifocal jurisdiction or a concurrent jurisdiction which can be used consecutively; means in continuation or in sequence.

18. It was argued that this order can be challenged only in appellate and revisional jurisdiction. However, considering the urgency in deciding these proceedings, the procedural wrangles which a litigant has to undergo in revision or in appeal shall defeat the very purpose of the pre-arrest bail. For example, in appeal or in revision, there is a stage of admission, which is redundant while entertaining anticipatory bail application by the High Court. Such application is to be summarily decided otherwise it affects the investigation which becomes standstill due to the delay.

19. I have no hesitation to mention that practice of moving in sequence before the Sessions Court and High Court is followed in Bombay High Court since the section was enacted in the Criminal Procedure Code and it is proved to be useful, fruitful and very much relief oriented. Today, such jurisdiction is found necessary in the interest of liberty of the individual and against the oppressive police action. Therefore, when the other view is taken by the High Court then it cannot be labeled as forum shopping.

20. Perused the complaint so also the documents which are alleged to be forged, especially the two wills, general Power of Attorney and the affidavit dated 14.6.2013. This Court at the time of hearing of the Anticipatory Bail Application with a view to verify the mental condition of Mr. Mehtab, as there were counter submissions about the mental health of Mr. Mehtab, had directed the Doctors from Government hospital to report about his health and it is confirmed that he is suffering from dementia. Earlier also, the Doctors have certified that he is forgetful and there is irreversible dementia and impairment of memory to a great extent. Moreover, after going through the alleged forged documents, which are produced before the Court, it appears that there is a prima facie case of forgery and cheating against the applicants/accused. It is further submitted that in all, there are 7 allegedly forged documents. However, the original Power of Attorneys which are submitted to the ICICI Bank, Central Bank of India, and State Bank of India, could not be obtained by the police as the banks have refused to part with the original documents. It is submitted by the learned Counsel for the complainant that in fact, the banks do not have original Power of Attorneys. The learned Counsel for the applicants/accused have made a statement that the original Power of Attorneys are with the banks. In view of such word against word, in my considered view, it is upto the Investigating Officer to get the original Power of Attorneys from the Banks as the banks can allow transactions of the attorney holder only on the basis of the original Power of Attorney. Out of the 7 documents, gift deed dated 1.10.2012 is missing and a missing complaint is lodged by the applicants/accused on 28.1.2013. This is a family dispute and in view of the seizure of the documents and considering the stage of investigation, I do not think there is any need for custodial interrogation of the applicants/accused.

21. In the circumstances, I am inclined to grant this application on the following terms:

- i) In the event of arrest, the applicants be enlarged on bail on furnishing P.R. Bond of Rs. 20,000/- each with one or two sureties each in the like amount;
- ii) The applicants/accused shall not tamper with the evidence;
- iii) The applicants/accused shall cooperate with the investigating agency and shall report to the police station, as and when called.\$\$

22. Anticipatory Bail Application is disposed of accordingly.